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February __, 2020

VIA FEDERAL RULEMAKING PORTAL

Brenda Fernandez
Office of Policy, Planning and Liaison
U.S. Small Business Administration
409 Third Street SW, 8th Floor
Washington, DC 20416

Re: RIN 3245-AG94, Proposed Rule
Consolidation of Mentor Protégé Programs and Other Government Contracting Amendments

Dear Ms. Fernandez:

We are writing to submit comments on the U.S. Small Business Administration's ("SBA") above-referenced proposed rule on amendments to its regulations to merge the 8(a) Business Development Program Mentor-Protégé Program and the All Small Mentor-Protégé Program ("ASMPP"), and revise certain 8(a) Program and small business regulations, including those related to small business and socioeconomic representations made in connection with multiple award contracts ("MAC"). See 84 Fed. Reg. 60846 (Nov. 8, 2019). PilieroMazza represents small businesses operating across the government contracting arena. Although many of SBA's proposed changes are welcome to the small business contracting community, we believe that the proposed rule as it currently stands may present compliance challenges for some small business contractors. Our comments to key proposed changes are below.

Small Business Joint Ventures

- **We Support the Elimination of the Three-Contract Limitation Within Small Business Joint Venture "3-in-2" Rule**

We applaud SBA's effort to simplify what is commonly referred to as the small business joint venture "3-in-2"rule, currently found in 13 C.F.R. § 121.103(h), by eliminating the rule's three-contract restriction. However, we believe that SBA should go further in its planned modification and also enlarge the period of time a small business joint venture is eligible to bid on contracts, from a two-year period to a five-year period.

Under the current version of the rule, small business joint ventures may compete for contracts and receive an exemption from affiliation for proposals submitted before either of the following two events: (1) expiration of a two-year time period from the award of the joint venture's first contract, or (2) the joint venture's receipt of three contract awards. SBA is proposing to eliminate the second "event," the three-contract restriction. In addition to the elimination of the three-contract restriction, we believe it would benefit the small business community to enlarge the timeframe a small business joint venture is eligible to bid on small business set-aside opportunities, from two years to five years.

The reality is that many joint venture partners are required to form a second or third joint venture after they are no longer able to bid on additional opportunities under the first joint venture. Requiring the formation of additional joint ventures creates an undue administrative burden on the venturers. It also squanders the name recognition and performance history the joint venture is able to establish as an independent entity before the joint venture is required to stop submitting additional proposals. This is especially true for small business joint ventures established between mentors and protégés—relationships that may last up to six years under SBA's regulations. A five-year term for the joint venture to submit proposals would also mirror the length of SBA's definition of a long-term contract, allowing the joint venture to submit additional proposals while it is still performing work on an initial contract award.

The two-year limitation also fails to take into account the uncertainty created by the ever-present protest process facing contractors. If a small business joint venture is awarded its initial contract and that contract is subsequently protested, it can be months (or potentially even years, depending on the protest forum) before that protest may be resolved. In these cases, the award of the initial contract may start the two-year "clock" before the joint venture is able to even begin performance, reducing its ability to capitalize on the timeframe in which it is able to submit additional proposals for new work.

Therefore, while we support SBA's proposed removal of the three-contract limitation, we believe that it should also expand the timeframe in which a joint venture may continue to submit proposals from two years to five years after award of the joint venture's first contract.

- **Small Business Joint Ventures Should Retain Ability to Replace Members**

SBA has requested comments regarding whether it should remove the exception to affiliation for joint ventures comprised of multiple small businesses in which firms enter and leave the joint venture based on their size status. SBA is particularly concerned regarding the potential scenario where a small business joint venture is awarded a long-term contract and then replaces members of the joint venture when one is no longer eligible to recertify as a small business at times of required recertification.

We believe that it is unfair to penalize all members of a joint venture when one is not able to recertify as a small business. If a member of the joint venture is no longer small at the time of recertification, the joint venture should retain the discretion to remove or replace that member. This flexibility will allow the joint venture partners that still maintain small business status to continue to benefit from their small business contract awards, while the joint venture's other-than-small partners will be required to leave the joint venture. So long as the joint venture is still comprised of small businesses and has provided any required notices to its agency customers, it should be allowed to continue contract performance. This will also have the added benefit of encouraging and rewarding contracting agencies for setting aside long-term contracts for small businesses.

- **Joint Venture Certifications and Facility Security Clearances Should Be Based on Joint Venture's Majority Partner**

We support SBA's suggestion that small business joint ventures should be able to utilize the certifications and facility security clearances of the majority joint venture partner, rather than requiring the joint venture entity itself to obtain such clearances. This would eliminate a significant amount of confusion on the part of both contractors and procuring agencies regarding the requirements for joint ventures to participate on cleared contracts, or contracts requiring certain certifications (such as CMMC or ISO 9001). The proposed change would also eliminate the burden on small businesses that currently requires them to incur the time and expense to secure not only their own clearances but those of their joint ventures as well.

The current policy of requiring the joint venture entity to obtain its own clearance also necessitates that the small business joint venturer populate the joint venture with administrative personnel to serve as the joint venture's facility security officer, which is counterintuitive to the concept of an unpopulated joint venture. Indeed, in most instances the facility security officers for both the small business and the joint venture are the same individual, which further illustrates the duplicative nature of requiring the joint venture entity to be cleared as well.

SBA may also want to consider involving the Defense Counterintelligence and Security Agency ("DCSA") in its review of this issue. DCSA will ultimately be the agency responsible for determining the acceptability of an entity's clearance, including joint ventures. We recommend that SBA start facilitating meetings with DCSA now to get DCSA's buy-in on SBA's proposed solution for this problem, and that the final version of the regulations reflect a cooperative effort between the two agencies.

- **Accounting of Receipts for Individual Joint Venture Partners Should Be Based on Workshare**

We support SBA's clarification that each joint venture partner should include its percentage share of the joint venture's receipts or employees based on its share of the percentage of work performed by the joint venture. In addition to this clarification, we believe SBA should also provide clarification regarding how the joint venture should account for the contract revenues that are apportioned to subcontractors performing under the joint venture's contract. For example, many joint venturers execute subcontracts through their own respective entities, rather than through the joint venture entity. Should the revenues falling under these subcontracts be apportioned to the responsible joint venturer, or should the total subcontracted amounts be split according to the venturers' respective workshare in the joint venture? SBA should provide additional clarification regarding how subcontracted revenues should be split between the venturers. We recommend that the joint venture partner responsible for a specific subcontract should take on that revenue as its share of the contract's total revenues, but if the subcontracts are executed with the joint venture directly, then the subcontracted revenues should be split according to ownership in the joint venture.

❖ **Profit Distributions to Small Business Joint Venture Participants Should Be Able to Be Greater than Small Business' Workshare in Joint Venture**

We support SBA's proposal to amend the regulations so that the small business participant in the joint venture is able to receive profits greater than those commensurate with the work they have performed in the joint venture. Limiting the amount of profits a small business participant in a joint venture is able to receive does not serve the purposes of the program, and therefore we believe that this proposed provision will serve the interests of the small business community. That said, it is unclear how often or why a small business joint venture partner would be able to negotiate this term to its benefit.

Multiple Award Contracts

❖ **SBA Should Require Size Standards to Be Assigned at the Order Level for Multiple Award Contracts**

We support SBA's decision to require that a single NAICS code be assigned for each order issued against a MAC, and that the NAICS code be one that is included in the underlying MAC and represents the principal purpose of the order. We agree that it does not make sense for a task order to have a service NAICS code when it is almost entirely for supplies, as a firm being awarded such an order would not have to comply with the nonmanufacturer rule. Relatedly, we agree that the current method for NAICS code assignment can be problematic where a MAC is assigned a NAICS code for supplies but a particular order is almost entirely for services, as firms that qualified as small for the larger employee-based size standard associated with a manufacturing/supply NAICS code may not qualify as small businesses under a smaller receipts-based services size standard. We believe SBA's proposed revisions to 13 C.F.R. § 121.402 will ensure that the NAICS codes and corresponding size standards assigned to specific procurement actions are an accurate reflection of the contracts and orders being awarded.

SBA is proposing to make significant changes to its regulations outlining the rules for when the size and socioeconomic status of a business concern is determined. As outlined below, we support some of the proposed changes and oppose others.[1]

[1] We support all of the proposed changes to 13 C.F.R. § 121.404 that are not discussed in these Comments.

- **SBA Should Not Require Recertification for Orders Set Aside Under Unrestricted MACs**

As it stands, for a MAC, SBA determines size at the time of initial offer (or other formal response to a solicitation), which includes price. This means that if a business is small and/or of a certain socioeconomic status (e.g., SDVOSB, WOSB, HUBZone) at the time of offer for the MAC, it will be considered small and/or of that certain socioeconomic status for each order issued against the MAC, unless a contracting officer requests a new size/status certification in connection with a specific order. In other words, generally speaking, a concern maintains its status for the life of a contract. This system creates predictability and security. Indeed, unless an exception applies, a concern can be confident in knowing that should it choose to commit the time and resources to procuring a MAC, it will be eligible for all orders set aside thereunder for which it qualified as of the date of its initial offer for the MAC. Given that MACs can have a period of performance of five years or longer, this is a significant benefit to the small business community.

However, according to SBA, the current system is problematic because it allows a concern that self-certifies as small (and/or of a certain socioeconomic status) for an unrestricted MAC to use that certification at a time in the future when it no longer qualifies as such to compete for an order set aside under the unrestricted MAC. To address this perceived issue, SBA proposes to modify its regulations to require recertification for all orders set aside under unrestricted MACs. As explained below, we do not support this proposed rule change.

For one thing, SBA's proposal undermines the general rule that a concern maintains its small business/socioeconomic status for the life of a contract. Without a doubt, an offeror's ability to rely on its MAC-level certifications when pursuing future orders is the very purpose of the "small for the life of the contract" rule. Moreover, the proposed rule would punish concerns that qualify and certify as small at the time of award of an unrestricted MAC, and thereafter experience organic growth that causes them to exceed the MAC's size standard. Lastly, we note that if the proposed rule is enacted it could have unintended adverse effects such as discouraging small business concerns from bidding on unrestricted MACs and reducing competition for small business task orders issued under unrestricted MACs.

SBA's regulations are intended to foster and promote small business growth. It does not make sense to stifle such growth by requiring task order recertification under unrestricted MACs. Thus, SBA should not adopt the proposed changes to 13 C.F.R. §§ 121.404(a)(1) for size, 124.503(i) for 8(a) BD eligibility, 125.18(d) for SDVO eligibility, or §127.504(c) for WOSB eligibility.

For the same reasons, we do not support SBA's proposal to revise 13 C.F.R. §§ 121.1004, 125.28, 126.801, and 127.603, to permit size/status protests regarding orders set aside under unrestricted MACs. If SBA disagrees with this comment, we request that SBA consider requiring small and socioeconomic status to be expressly certified when proposals are submitted for unrestricted MACs and, in turn, allowing size or status protests at that time. A protested concern determined to be ineligible under its certified size or status could still receive an unrestricted award but would be ineligible for set asides, unless its circumstances change and SBA subsequently agrees that it is eligible.

All of this being said, we recognize SBA's concern that competitors are never in a position to timely challenge the small business representations made by unrestricted MAC contract holders. One potential solution for this problem is that, instead of asking offerors to represent their <u>current</u> small business size status for set-aside orders on unrestricted MACs, SBA could instead ask offerors to represent that the small business representations made at the time they were initially awarded the MAC vehicle were correct and valid. Competitors could still challenge this "rerepresentation" of small business size status, but the rerepresentation would not be of the offeror's current size status, and would instead relate back to the time the offeror was awarded the contract vehicle.

We also believe that any application of this new rule should not apply retroactively to MACs already awarded. It would be unfair for SBA to penalize firms that have invested resources in winning these valuable MAC vehicles, only to limit their ability to participate in task order competition at a later point in time.

- **Joint Venture Recertification Should Be Dependent Solely on Managing Venturer Recertification**

SBA is proposing to revise 13 C.F.R. §121.404(g) to indicate that, for recertification purposes, when a partner to a joint venture has been acquired, is acquiring, or has merged with another business entity, only that partner must recertify its size status in order for the joint venture to recertify its size. SBA believes requiring the non-affected small business partner(s) to also recertify would be unfair because if that partner(s) has, for example, experienced organic growth since the joint venture was first awarded the subject contract (something which SBA supports), its recertification could have the unintended consequence of precluding the joint venture from being able to recertify as small. We support this clarification and SBA's underlying reasoning.

However, we believe that to truly promote small business growth, SBA should further revise 13 C.F.R. §121.404(g) to state that after a joint venture is awarded a small business contract, it is only required to recertify when its <u>managing</u> venturer, or the small business concern upon which the joint venture's eligibility for the contract was based, is acquired by, is acquiring, or has merged with another business entity. A managing venturer cannot control what its partner venturer does with its own business. Thus, it would be unfair to require the joint venture to recertify when the partner venturer experiences a merger or acquisition, especially because joint ventures are intended to be limited duration entities and, in many cases, the scope of a partner venturer's acquisition or merger alone would likely preclude the joint venture from being able to recertify as small.

❖ **Recertification Should Not Be Required If An Offeror Experiences a Merger or Acquisition Between Offer and Award**

Currently, SBA's regulations do not expressly provide when a concern's size should be determined if the concern undergoes a merger or acquisition between the time of offer and award. The general rule states that a concern's size should be determined as of the date of its initial offer, including price. The exception requires a contractor to recertify its size status to the procuring agency within 30 days of merger, sale, or acquisition. However, neither rule expressly contemplates the effect of an acquisition, merger, or sale on an offeror with a pending proposal. Thus, SBA is proposing to "clarify" that if a merger or acquisition causes a firm to recertify as other than small between the time of offer and award, the recertified firm will not be considered a small business for the solicitation. In addition, SBA's proposal would permit size protests specifically targeted at such situations. As explained below, we do not support this proposed rule change.

As an initial matter, we do not view this change as a simple clarification. SBA's proposed rule assumes that offerors are already recertifying when they experience a merger or acquisition during the pendency of a proposal and that the effect of the recertification is the only uncertainty. We do not believe that is the case. As noted above, SBA's regulations clearly impose recertification duties on contractors, but do not clearly impose the same on offerors. <u>See</u> 13 C.F.R. § 121.404(g)(2) ("the <u>contractor</u> must, within 30 days of the transaction becoming final, recertify its small business size status to the procuring agency, or inform the procuring agency that it is other than small.") (emphasis added). Thus, the recertification rules, on their face, do not apply to offerors.

As it relates here, we believe SBA's proposed rule would create undue market constraints by limiting the growth strategies small businesses with pending proposals can pursue, especially since some procurements are not resolved for many months or even years. Simply put, calculating size as of the date a concern submits its initial offer provides certainty to small business government contractors. SBA's proposed rule would create an unnecessary moving target. As such, rather than adopting the proposed rule, we believe SBA should revise its regulations to indicate that an offeror's size will be determined as of the date of its initial offer, regardless of whether it experiences an acquisition or merger while its proposal is pending, and that an offeror is not required to recertify to the procuring agency for any pending proposals.

That being said, if a competitor believes an awardee had an agreement to merge in place at the time it submitted its offer—even if the merger was not "finalized" until after the offer was submitted—the competitor can challenge the awardee's size under SBA's "present effect" rule. This procedural mechanism should alleviate any lingering concerns arising out of the perceived unfairness in the possibility that a large business will be awarded a set aside contract.

- **Recertification Should Not Be Required When a Small Business Changes To or From a Wholly Owned Business Concern of the Same Entity**

We applaud SBA's decision to revise its regulations to clarify that a concern that is at least 51% owned by an entity (i.e., tribe, Alaska Native Corporation ("ANC"), Native Hawaiian Organization ("NHO"), or Community Development Corporation ("CDC")) need not recertify its status as a small business when the ownership of the concern changes to or from a wholly-owned business concern of the same entity, as long as the ultimate owner remains that entity. We believe this change makes sense and that a rule to the contrary would elevate form over substance.

- **Contracting Officers Should Not Be Permitted to Request Recertification at Any Point During a Concern's Performance of a Long-Term Contract**

We do not support SBA's decision to amend 13 C.F.R. §121.404(g)(3) to specifically permit a contracting officer to request size recertification as he or she deems appropriate at any point during a long-term contract. As a threshold matter, we do not believe this authority already exists within the current regulatory language. SBA's regulations indicate that a contracting officer can request recertification for task orders issued under MACs. See 13 C.F.R. §121.404(a)(1)(i) ("If a business is small at the time of offer for the Multiple Award Contract, it is small for each order issued against the contract, unless a contracting officer requests a new size certification in connection with a specific order.") (emphasis added). However, we are unaware of an existing regulation that would expressly permit a contracting officer to request recertification at any other point in time.

Furthermore, we believe SBA's proposal undermines the general rule that a concern's size status should be determined as of the date of its initial offer, which, as explained above, provides predictability and consistency to the procurement process. Moreover, SBA's proposed rule could easily be applied arbitrarily. Indeed, such a rule would increase the likelihood of preferential treatment and could create situations wherein certain contractors are targeted for off-ramping or early termination. What is more, SBA's proposed rule could have unintended adverse effects such as discouraging small business concerns from bidding on long-term contracts. For example, small businesses experiencing significant organic growth (which is a good thing) might view investing in the pursuit of a long-term contract as unnecessarily risky, given that recertification could be requested at any time. In short, contracting officers should not be permitted to request recertification at any point during a concern's performance of a long-term contract.

8(a) Business Development Program

- **Definition of Follow-On Requirement or Contract Provides Needed Clarification**

SBA is proposing to add a definition of what a follow-on requirement or contract is to 13 C.F.R. § 124.3. Adding such a definition will help to alleviate confusion in determining whether a requirement or contract should be considered follow-on or not. Accordingly, we take no issue and support the proposed addition.

- **More Clarifications Required Regarding Changes Proposed to Immediate Family Member Restriction**

Currently, SBA's regulations state that an individual may not use his or her disadvantaged status to qualify a company for the 8(a) program if that individual has an immediate family member who is using or has used his or her disadvantaged status to qualify another company for the 8(a) program. SBA may waive this prohibition if the two concerns have "no connections, either in the form of ownership, control or contractual relationships . . . ." However, where the companies are in the same or similar line of business, there is a presumption against granting the waiver.

Through the proposed rule, SBA recognizes that requiring "no connections is a bit extreme." Accordingly, SBA is proposing to revise the regulation to state that the immediate family member restriction would apply in instances where there is common ownership or management, regardless of amount or position, or where the companies have a contractual relationship that was not conducted at arm's length. SBA requests comments on this provision.

Overall, we support the proposed change. However, it is unclear based on the proposed language whether a waiver would still be required. And, to the extent a waiver is required, it is unclear whether there would still be a presumption against granting the waiver if the companies are in the same or similar line of business. We submit that a waiver of the immediate family restriction, where there is no common ownership or management and any contractual relationship is conducted at arm's length, should not be required. Rather, companies should be eligible to apply without the need for a waiver. Indeed, SBA recognizes that it did not intend to impose a blanket restriction. We also submit that SBA should clarify in the final rule the relevant time for its inquiry as to whether there is common ownership or management or a contractual relationship that was not conducted at arm's length. Specifically, SBA should only consider whether there is common ownership or management or a contractual relationship that was not conducted at arm's length as of the date the company submits an application for the 8(a) program and continuing forward. SBA should not, however, use connections or contractual relationships that existed prior to an application submission to find a company ineligible for the 8(a) program. To look at the facts as they exist as of the date of application would be consistent with SBA's and the Office of Hearings and Appeals' ("OHA") treatment of prior connections, which are not controlling in the assessment of affiliation as of the date of size self-certification.

Additionally, the proposed revised language for 13 C.F.R. § 124.105(g)(2) states that SBA will, as part of its annual review, "assess whether the firm continues to operate independently of the other current or former 8(a) concern of an immediate family member." However, the proposed revised language to 13 C.F.R. § 124.105(g)(1) does not require that the two firms "operate independently" of one another. Rather, the companies may have contractual relationships, provided that they are conducted at arm's length. We do not believe that it is SBA's intention to initiate termination proceedings where the companies later enter into one or more arm's length contractual relationships, as this would be permissible for entry into the program. We request that the rule be clarified.

- **Further Revisions Required for Change of Ownership Requirements**

SBA has proposed two changes regarding the change of ownership requirements found in 13 C.F.R. § 124.105(i). First, SBA proposes to lessen the burden on 8(a) participants seeking minor changes in ownership by providing that SBA approval is not needed when a previous owner held less than a 20% interest in the company both before and after the transaction. This is a change from the current regulation, which contemplates the same, but for less than a 10% interest both before and after the transaction. Additionally, SBA proposes to provide that prior SBA approval is not needed where the disadvantaged individual or entity in control of the participant will increase the percentage of his, her, or its ownership interest.

We applaud SBA for these proposed changes. As SBA is aware, the current review and approval process for change of ownership requests is taking months, and in some cases, well over a year. This is causing an undue burden on 8(a) participants. While the proposed changes are welcome, the rule should be further revised to clarify that any change of ownership that either does not impact the qualifying, majority owner of the participant or that simply increases the percentage of the qualifying, majority owner's ownership interest should not require prior SBA approval. We represent a number of 8(a) participants with change of ownership requests to SBA. Unfortunately, due to the delay in processing, participants are being inhibited from continuing with normal business operations, such as filing tax returns, as companies cannot report the change of ownership on their tax returns until approved by SBA. In order to reduce this burden, we submit that the rule should be revised to provide that prior SBA approval is not required where there is no change to the qualifying, majority owner's ownership interest or where the percentage of the qualifying, majority owner's ownership interest is simply increased. In either instance there should be no question as to whether the participant continues to meet the ownership and control requirements.

In addition to the proposed revisions to the change of ownership requirements in 13 C.F.R. § 124.105(i), SBA is also proposing to clarify that a participant owned by an ANC, tribe, or CDC does not need to request a change of ownership from SBA where the ANC, tribe, or

CDC merely reorganizes its ownership by either inserting or removing a wholly-owned business entity between the ANC/tribe/CDC and the participant. We support this change. At the end of the day, the ANC/tribe/CDC will still ultimately control, as required under SBA's regulations. And, because the status of the participant is based on the ANC/tribe/CDC, the participant will continue to qualify as an entity owned and controlled by the ANC/tribe/CDC.

- **Clarification Regarding Primary NAICS Code of Tribally Owned, NHO-Owned, and CDC-Owned Participants Is Welcome**

SBA regulations provide that an ANC/tribe, NHO, or CDC may not own 51% or more of a firm which, either at the time of application or within the previous two years, has been operating in the 8(a) program under the same primary NAICS code as the applicant. Through the proposed rule, SBA seeks to clarify these regulations. Specifically, SBA proposes to clarify that if the primary NAICS code of the participant is changed, either by SBA or through a request by the participant, then the ANC/tribe, NHO, or CDC could submit an application to qualify another company for the 8(a) program under the primary NAICS code that was previously held by the participant whose primary NAICS code was changed, without needing to wait two years. We support this proposed change, as the restriction should not apply where the participant's primary NAICS code has changed.

- **Firm Written Commitment Is Logical Requirement for Tribally-Owned Applicants**

One of the methods to establish potential for success of a tribally-owned applicant is for the tribe to make a firm written commitment to support the operations of the applicant and have the financial ability to do so. In the proposed rule, SBA proposes to permit a tribally-owned applicant to satisfy the potential for success requirement by submitting a letter of support from a tribally-owned economic development corporation or other relevant tribally-owned holding company. We support this proposed change. Indeed, the economic development corporation or tribally-owned holding company is authorized to act on behalf of the tribe and is essentially an economic arm of the tribe itself. And, oftentimes due to the size of the tribe and tribal bureaucracy, it can be difficult and take significant amounts of time and resources to obtain the commitment letter directly from the tribe. Given the size of a tribe's overall operations, tribes tend to rely heavily on the leadership and autonomy of their holding companies to support the operations of their subsidiaries. Accordingly, it is logical for SBA to permit the firm written commitment to come from either the tribe or an economic development corporation/tribally-owned holding company in order to establish potential for success.

- **Changes Regarding Excessive Withdrawals for Entity-Owned 8(a) Participants Make Sense**

SBA is proposing to amend 13 C.F.R. § 124.112(d)(5) regarding excessive withdrawals in connection with entity-owned 8(a) participants to eliminate confusion as to whether a participant that is owned at least 51% by a tribe, ANC, NHO, or CDC can make a distribution to a non-disadvantaged individual that exceeds the excessive withdrawal limitation if it is made as part of a pro rata distribution to all shareholders. SBA believes that the participant generally should be able to make such a withdrawal and proposes to amend the regulation accordingly. We support this proposed change.

- **Permit Appeals of Change of Primary NAICS Code**

SBA is proposing to authorize an appeal process for use where SBA has changed a participant's primary NAICS code on SBA's own initiative. Specifically, an appeal may be made to SBA's Associate General Counsel for Procurement Law within 10 business days of receiving the district office's final determination changing the primary NAICS code, and a decision shall be issued within 15 business days of receiving the appeal. We support this addition and proposed change.

- **SBA-Sponsored 8(a) Preparatory Course Should Not Be Required**

SBA seeks comments on whether it should add a provision that would require small business concerns that seek to apply to the 8(a) program to first take an SBA-sponsored preparatory course. While we appreciate SBA's intent behind such a course, we do not believe that requiring a preparatory course will reduce the number of unsuccessful applications or increase the percentage of successful applications. In our experience, companies seeking admission are going to apply regardless, and we do not believe that requiring a preparatory course will have any material benefit on the application process, but will simply require additional time and expense from both SBA and the applicant.

- **Commitment to Timeline to Reapply to the 8(a) Program and Request for Reconsideration**

SBA is proposing to amend the time for which an applicant must wait to reapply to the 8(a) program after receipt of the final agency decision denying its application. Specifically, SBA is proposing to change the waiting period from 12 months to 90 days. We fully support this change, as a year is a significant amount of time and 90 days is consistent with the HUBZone program certification and SBA's proposed changes to the WOSB certification process.

However, SBA also requests comments on whether the current reconsideration process should be eliminated if the 90 day waiting period is implemented. We strongly oppose eliminating the current reconsideration process, which states that an applicant may request reconsideration of the denial within 45 days of receipt of the denial letter. Oftentimes, companies are denied admission to the 8(a) program for only one or two reasons or for an item that perhaps SBA misinterpreted, which can be resolved through the request for reconsideration process. Eliminating this process will cause significant delay and harm to the applicants. Indeed, requiring the applicant to wait 90 days, as opposed to 45 days, and to start completely over with the application submission will put the applicant at the end of the line. In our experience, 8(a) applications are currently taking approximately one year to receive a decision. If applicants receive a denial letter and request reconsideration, in our experience SBA is currently taking approximately two months to process the reconsideration request. This means that an applicant could receive SBA's final decision roughly three to four months after the initial denial. However, if an applicant is required to wait 90 days to reapply and then must wait approximately one year for a final decision, rather than a waiting period of approximately three or four months, this could turn into a delay of a year and three months, if not longer. In short, the current reconsideration process should not be eliminated.

- **Voluntary Withdrawal and Early Graduation**

Currently, while an 8(a) participant may voluntarily withdraw and early graduate at any time prior to the expiration of its program term, the regulations presently contemplate that this request be first submitted to the district office, and then the district office will send the request to the Associate Administrator for Business Development ("AA/BD") for final approval. In the proposed rule, the voluntary withdrawal or early graduation request would be complete once the district director recognizes the action. We agree with SBA that this will assist in reducing processing times and we support this proposed change.

- **Suspension During Appeal of An SBA Decision to Early Graduate or Terminate**

Under SBA's current regulations, if the AA/BD renders a decision to early graduate or terminate a participant from the 8(a) program, the participant has 45 days to appeal that decision to OHA. If no appeal is made, the AA/BD's decision becomes final. However, if an appeal is made, the final decision will be the decision of the administrative law judge at OHA, once rendered. During the appeal process, the decision is not yet considered final and the participant is considered active. However, SBA is proposing to treat a firm as suspended where the AA/BD issued a decision to early graduate or terminate a participant and where an appeal is made, such that the participant would not be considered an active 8(a) participant during the appeal proceeding. We oppose this proposed revision. Specifically, an 8(a) participant should continue receiving 8(a) benefits throughout the course of an appeal, as an abrupt suspension could have significant negative impact on the participant and its business development opportunities. Indeed, there are likely to be 8(a) opportunities, whether competitive or sole source, that the participant may have been working toward for a significant period of time but which it may then no longer pursue due to the proposed termination or graduation. And, SBA's proposed recourse of adding the length of the suspension onto the participant's program term if OHA ultimately overturns the termination or graduation would not be sufficient to put the participant back into the same place it was at the time of suspension. The participant's reputation may be tarnished (with the SBA district office, procuring agencies, and teaming partners) and whatever opportunities it was tracking and pursuing will likely have passed at that point, causing significant financial harm to the participant.

Additionally, the proposed regulation is redundant to a procedure already available to SBA through 13 C.F.R. § 124.305, which states that "at any time after SBA issues a Letter of Intent to Terminate an 8(a) Participant pursuant to § 124.304, the AA/BD may suspend 8(a) contract support and all other forms of 8(a) BD program assistance to that Participant until the issue of the Participant's termination from the program is finally determined." 13 C.F.R. § 124.305(a). Critically, however, the suspension is not automatic. Rather, suspension is only appropriate where the AA/BD "determines that suspension is needed to protect the interests of the Federal Government, such as where information showing a clear lack of program eligibility or conduct indicating a lack of business integrity exists, including where the concern or one of its principals submitted false statements to the Federal Government." Id. To revise 13 C.F.R. § 124.304(d) to provide for an automatic suspension is contrary to 13 C.F.R. § 124.305 and applies a different burden. Imposing an automatic suspension is improper and duplicative to a remedy SBA already has available. As an example, it would be improper for SBA to impose a suspension where an individual merely disagrees with SBA's calculation of one or more of the economic disadvantage criteria and thus files an appeal. Disagreeing with SBA's calculation does not "show[that] a clear lack of program eligibility or conduct indicating a lack of business integrity exists," nor does it show submission of "false statements to the Federal Government." Accordingly, we oppose the proposed regulation.

- **Business Plan**

SBA's regulations currently provide that a newly admitted participant must submit its business plan to SBA as soon as possible after program admission and that the participant will not be eligible for program benefits until SBA approves such plan. Through the proposed rule, SBA is proposing to eliminate the directive that the participant cannot receive any 8(a) program benefits until after SBA has approved its business plan; rather, the participant may receive program benefits immediately provided the participant submits its plan to SBA for approval within 60 days after program admission. We appreciate SBA's recognition of the delays and other consequences incurred because of the current requirements and support this proposed change, as it will enable 8(a) participants to start receiving the benefits of the program in a timelier manner and enjoy their full nine-year term.

- **Bona Fide Place of Business**

SBA requests comments on whether a participant may submit an offer when that participant has filed a request to have a bona fide place of business recognized by SBA in time for a particular 8(a) construction procurement, but has not yet received a response from SBA before the date offers are due. We support such companies' ability to presume approval where SBA has not issued a decision within the specified time limits; these companies should be able to submit an offer as eligible participants. However, SBA should clarify what happens if a participant submits an offer and SBA later does not verify that participant's bona fide place of business.

❖ **8(a) Contracts**

SBA proposes a number of changes to 13 C.F.R. § 124.504, which discusses circumstances that limit SBA's ability to accept a procurement for award as an 8(a) contract. Specifically, SBA is proposing that as long as a procuring agency clearly identified a requirement as a competitive 8(a) procurement and the public fully understood it to be restricted only to eligible 8(a) participants, SBA may accept that requirement regardless of when the offering occurred. Additionally, SBA is proposing to clarify that the request for and granting of a release of a follow-on procurement from the 8(a) program is required where the procurement will be moved out of the 8(a) program as an independent contract into a MAC or GWAC. Similarly, SBA is proposing to clarify that in all cases where a procuring agency seeks to fulfill a follow-on requirement outside of the 8(a) program, except where it is statutorily or otherwise required to use a mandatory source, the agency must make a written request to and receive the concurrence of SBA. We support these proposed changes. Given the trend of agencies moving towards MACs and GWACs, the proposed changes will make it easier for SBA to accept a requirement into the 8(a) program and limit the ability for agencies to try to move contracts outside of the 8(a) program.

❖ **Bridge Contracts**

SBA seeks comments as to whether its long-standing policy that the value of a bridge contract is not typically considered in determining whether an offered procurement is a new requirement should be incorporated into the regulations. Given that a bridge contract, by its nature, is not meant to be a new requirement but rather is a temporary measure to ensure the continuation of service, we agree with SBA that a bridge contract should not typically be considered in determining whether an offered procurement is a new requirement. To the extent SBA wishes to add this to its regulations, we support it.

❖ **Waiver of 8(a) Sole Source Prohibition**

Currently, when a participant is placed on an 8(a) sole source prohibition for failure to meet its non-8(a) business activity target mix, 13 C.F.R. § 124.509 requires the AA/BD to process a request for a waiver in every case, meaning for each sole source contract. SBA is proposing to substitute "SBA" for the AA/BD, to allow flexibility to determine the level at which the waiver may be processed, regardless of whether the waiver request is submitted by the participant or the agency. We agree with SBA that district offices should be able to process waiver requests, as this will assist in expediting the process. We believe that all waiver requests should be processed at the district office level, as adding additional layers of review significantly delays the processing time, harming both the participant and the agency and causing additional work and expense for SBA.

❖ **Business Activity Targets**

The revision described immediately above is SBA's sole proposed revision to 13 C.F.R. § 124.509. However, this minor change is not enough. As detailed below, we believe that this regulation needs to be revised significantly in order to be consistent with the Small Business Act. Specifically, the Small Business Act provides that while an 8(a) participant is in the transitional stage and subject to certain non-8(a) business activity targets, it must either certify that it has complied with the business activity target regulation or that it is in compliance with certain remedial measures, such as making good faith efforts to expand the dollar volume of its non-8(a) contracts. See 15 U.S.C.A. § 636(j)(10)(I)(iii).

In addition, the non-8(a) business activity target percentages currently in the regulation are too high. At minimum, SBA should lower the percentages by 10% for each year in the transitional stage, as the Small Business Act does not set specific percentages, but simply requires that targets be established and consistently increased. See id.

As the regulation currently stands, SBA has implemented a rigid application of the "business activity target" rule. We represent a number of entity- and individually-owned firms that are placed on sole source restrictions, often through no fault of their own. Specifically, companies often do not meet their non-8(a) business activity targets due to extenuating circumstances such as a reduction in government funding, continuing resolutions and budget uncertainties, increased competition driving prices down (and for which small businesses have a harder time competing on a competitive basis), and having prime contractors award less work to small business subcontractors than originally contemplated, to name a few. Then, once a restriction is placed, this causes the participants to exhaust additional resources in order to submit waiver requests, many of which are not granted, which causes additional financial hardship on the participants. Accordingly, and consistent with the Small Business Act, the restriction should not be automatic but rather discretionary. Indeed, as long as participants are making good-faith efforts to meet their non-8(a) business activity targets, they should not be placed on a restriction. To evidence these good-faith efforts, we propose that SBA may require a participant that has failed to meet its non-8(a) business activity target to submit a remedial action plan. Only if SBA finds that a participant has made no efforts to obtain non-8(a) work should SBA impose a sole source restriction. We believe a restriction should only be used as a last resort. In order to revise the "business activity target" rule to be consistent with the clear language and intent of the Small Business Act, we propose that 13 C.F.R. § 124.509 be revised in its entirety as follows:

(a) General.

> *(1) To ensure that Participants do not develop an unreasonable reliance on 8(a) awards, and to ease their transition into the competitive marketplace after graduating from the 8(a) Business Development (BD) program, Participants must make good faith efforts to obtain business outside the 8(a) BD program. Work performed by an 8(a) Participant for any Federal department or agency other than through an 8(a) contract, including work performed on orders under the General Services Administration Multiple Award Schedule program, and work performed as a subcontractor, including work performed as a subcontractor to another*

8(a) Participant on an 8(a) contract, qualifies as work performed outside the 8(a) BD program.

(2) During both the developmental and transitional stages of the 8(a) BD program, a Participant must make good faith efforts, including following a reasonable marketing strategy, to attain the targeted dollar levels of non–8(a) revenue established in its business plan. It must attempt to use the 8(a) BD program as a resource to strengthen the Participant for economic viability when program benefits are no longer available.

(b) Required non–8(a) business activity targets during transitional stage—

(1) General. During the transitional stage of the 8(a) BD program, a Participant must make good faith efforts to achieve certain targets of non–8(a) contract revenue (i.e., revenue from other than sole source or competitive 8(a) contracts). These targets are called non–8(a) business activity targets and are expressed as a percentage of total revenue. The targets call for an increase in non–8(a) revenue over time.

(2) Non–8(a) business activity targets. During their transitional stage of program participation, Participants must make good faith efforts to meet the following non–8(a) business activity targets each year:

Participant's year in the transitional stage	***Non-8(a) business activity targets (required minimum non-8(a) revenue as a percentage of total revenue)***
1	*5*
2	*15*
3	*25*
4	*35*
5	*45*

(3) Compliance with non–8(a) business activity targets. SBA will measure the Participant's compliance with the applicable non–8(a) business activity target at the end of each program year in the transitional stage based on the Participant's latest fiscal year-end total revenue. Thus, at the end of the first year in the transitional stage of program participation, SBA will compare the Participant's non–8(a) revenue to its total revenue during the Participant's preceding fiscal year. If appropriate, SBA may require remedial measures during the subsequent program year. Thus, for example, non-compliance with the required non–8(a) business activity target in year one of the transitional stage may cause SBA to initiate remedial measures under paragraph (d) of this section for year two in the transitional stage.

(4) Certification of compliance. A Participant must certify as part of its offer that it has made good faith efforts to comply with the applicable non–8(a) business activity target or with the measures imposed by SBA under paragraph (d) of this section before it can receive any 8(a) contract during the transitional stage of the 8(a) BD program.

(c) Reporting and verification of business activity.

(1) Once admitted to the 8(a) BD program, a Participant must provide to SBA as part of its annual review:

(i) Annual financial statements with a breakdown of 8(a) and non–8(a) revenue in accord with § 124.602; and

(ii) An annual report within 30 days from the end of the program year of all non–8(a) contracts, options, and modifications obtained and performed on during the Participant's preceding fiscal year.

(2) At the end of each year of participation in the transitional stage, the Business Opportunities Specialist (BOS) assigned to work with the Participant will review the Participant's total revenues to determine whether the non–8(a) revenues have met the applicable target. In determining compliance, SBA will compare all 8(a) revenues earned during the Participant's preceding fiscal year, including those from options and modifications, to all non–8(a) revenues earned during the year.

(d) Potential consequences of not meeting competitive business mix targets.

(1) Beginning at the end of the first year in the transitional stage (the fifth year of participation in the 8(a) BD program), if a Participant does not meet its applicable competitive business mix target for the most recently completed fiscal year, SBA may request that the Participant submit evidence of specific efforts made by the Participant during the just completed fiscal year to obtain business outside the 8(a) BD program (e.g., responding to non-8(a) competitive solicitations).

(i) If SBA determines that a remedial action plan is required, SBA will notify the participant in writing that it has 30 days from the date it receives the letter to submit a written response to SBA describing specific efforts to be made by the Participant to obtain non-8(a) revenue.

(ii) Following the 30-day response period, SBA will consider any information submitted in response by the Participant. SBA will make best faith efforts to issue a decision within 60 days from receipt of the Participant's remedial action plan. Until SBA issues a decision either approving or denying the remedial action plan, SBA will not implement any additional remedial measures.

(A) If SBA does not approve the remedial action plan and issues a decision finding that the Participant did not make good faith efforts to obtain non-8(a) revenue, SBA may implement additional remedial measures which may include, but are not limited to requiring the Participant to obtain management assistance, technical assistance, and/or counseling, and/or attend seminars relating to management assistance, business development, financing, marketing, accounting, or proposal preparation.

(B) If SBA approves the remedial action plan and issues a decision finding that the Participant did make good faith efforts to obtain non-8(a) revenue, SBA will not implement any additional remedial measures: (1) for the remainder of the current program year if the plan is approved within the first six months of the current program year; or (2) for the remainder of the current program year and the ensuing program year if the plan is approved during the last six months of the current program year.

(2) SBA perceives an 8(a) sole source prohibition as more punitive than remedial, so it is a measure of last resort. However, if SBA finds that a Participant made no efforts to obtain business outside the 8(a) BD program, the Participant will be ineligible for sole source 8(a) contracts in the current program year, unless and until the Participant corrects the situation as described in paragraph (d)(3) of this section.

(3) If SBA determines that an 8(a) Participant made no efforts to meet its applicable competitive business mix target during any program year in the transitional stage of program participation, SBA may increase its monitoring of the Participant's contracting activity during the ensuing program year. SBA will also notify the Participant in writing that the Participant will not be eligible for further 8(a) sole source contract awards until

it has demonstrated to SBA that it has complied with its non–8(a) business activity requirements as described in paragraphs (d)(3)(i)-(d)(3)(iii) of this section. In order for a Participant to come into compliance with the non–8(a) business activity target and be eligible for further 8(a) sole source contracts, it may:

(i) At its option, submit information to SBA demonstrating that extenuating circumstances beyond the Participant's control caused the Participant not to meet its non–8(a) business activity target. SBA will make best faith efforts to issue a reinstatement decision within 60 days of its receipt of the information submitted by the Participant;

(ii) Wait until the end of the current program year and demonstrate to SBA as part of the normal annual review process that it has met the revised non–8(a) business activity target; or

(iii) Submit information regarding its non–8(a) revenue to SBA quarterly throughout the current program year in an attempt to come into compliance before the end of the current program year. If the Participant satisfies the requirements of paragraphs (d)(3)(iii)(A) or (d)(3)(iii)(B) of this section, SBA will reinstate the Participant's ability to obtain sole source 8(a) contracts prior to its annual review.

(A) To qualify for reinstatement during the first six months of the current program year (i.e., at either the first or second quarterly review), the Participant must demonstrate that it has earned non–8(a) revenue and new non–8(a) contract awards that are equal to or greater than the dollar amount by which it failed to meet its non–8(a) business activity target for the just completed program year. For this purpose, SBA will not count options on existing non–8(a) contracts in determining whether a Participant has received new non–8(a) contract awards.

(B) To qualify for reinstatement during the last six months of the current program year (i.e., at either the nine-month or one year review), the Participant must demonstrate that it has achieved its non–8(a) business activity target as of that point in the current program year.

Example 1 to paragraph (d)(3). Participant A had $10 million in total revenue during year 3 in the transitional stage (year 7 in the program), but failed to meet the minimum non–8(a) business activity target of 25 percent. It had 8(a) revenues of $8.5 million and non–8(a) revenues of $1.5 million (15 percent). Based on total revenues of $10 million, Participant A should have had at least $2.5 million in non–8(a) revenues. Thus, Participant A missed its target by $1 million (its target ($2.5 million) minus its actual non–8(a) revenues ($1.5 million)). If SBA finds that Participant A made no efforts to obtain business outside the 8(a) BD program and, therefore, Participant A did not achieve its non–8(a) business activity target, it cannot receive 8(a) sole source awards until correcting that situation. The Participant may wait until the next annual review to establish that it has met the revised target, or it can choose to report contract awards and other non–8(a) revenue to SBA quarterly. Participant A elects to submit information to SBA quarterly in year 4 of the transitional stage (year 8 in the program). In order to be eligible for sole source 8(a) contracts after either its 3 month or 6 month review, Participant A must show that it has received non–8(a) revenue and/or been awarded new non–8(a) contracts totaling $1 million (the amount by which it missed its target in year 3 of the transitional stage).

Example 2 to paragraph (d)(3). Participant B had $10 million in total revenue during year 3 in the transitional stage (year 7 in the program), of which $8.5 million were 8(a) revenues and $1.5 million were non–8(a) revenues. At its first two quarterly reviews during year 4 of the transitional stage (year 8 in the program), Participant B could not demonstrate that it had received at least $1 million in non–8(a) revenue and new non–8(a) awards. In order to be eligible for sole source 8(a) contracts after its 9 month or 1 year review, Participant B must show that at least 35% (the non–8(a) business activity target for year 4 in the transitional stage) of all revenues received during year 4 in the transitional stage as of that point are from non–8(a) sources.

(4) In determining whether a Participant has achieved its required non–8(a) business activity target at the end of any program year in the transitional stage, or whether a Participant that failed to meet the target for the previous program year has achieved the required level of non–8(a) business at its nine-month review, SBA will

measure 8(a) support by adding the base year value of all 8(a) contracts awarded during the applicable program year to the value of all options and modifications executed during that year.

(e) Waiver of sole source prohibition.

(1) SBA may waive the requirement prohibiting a Participant from receiving further sole source 8(a) contracts when the Participant does not meet its non-8(a) business activity target where a denial of a sole source contract would cause severe economic hardship on the Participant such that the Participant's survival may be jeopardized, or where extenuating circumstances beyond the Participant's control caused the Participant not to meet its non-8(a) business activity target..

(2) SBA may waive the requirement prohibiting a Participant from receiving further sole source 8(a) contracts when the Participant does not meet its non-8(a) business activity target where the head of a procuring activity represents to the SBA that award of a sole source 8(a) contract to the Participant is needed to achieve significant interests of the Government.

(3) The decision to grant or deny a request for a waiver is at SBA's discretion, and no appeal may be taken with respect to that decision.

(4) A waiver generally applies to a specific sole source opportunity. If SBA grants a waiver with respect to a specific procurement, the Participant will be able to self-market its capabilities to the applicable procuring activity with respect to that procurement. If the Participant seeks an additional sole source opportunity, it must request a waiver with respect to that specific opportunity. Where, however, a Participant can demonstrate that the same extenuating circumstances beyond its control affect its ability to receive specific multiple 8(a) contracts, one waiver can apply to those multiple contract opportunities.

Additionally, SBA should give strong consideration to exempting entity-owned firms from the business activity target rule altogether. Indeed, agencies often prefer to sole source to entity-owned firms for ease and do not give entity-owned firms a choice in whether the requirement is sole sourced or competed competitively. Given the expanded dollar thresholds for sole source awards made to entity-owned firms, it also does not make sense to penalize the firms that are eligible for these larger sole source awards if they are then unable to successfully balance their 8(a) work with their non-8(a) work. The greater good for the community that is being served by an entity-owned firm should be considered, as placing a restriction on an entity-owned firm's revenue stream does not just harm the participant, but also the communities that these entities ultimately benefit. And, there are other restrictions in place for entity-owned firms, such that exempting these firms from the business activity target rule would not result in abuse.

- **Approval of 8(a) Joint Ventures**

SBA's regulations currently require that SBA approve a joint venture agreement prior to award of an 8(a) contract, whether competitive or sole source, to the joint venture. SBA does not approve joint ventures in any other context. SBA proposes to eliminate the need for 8(a) participants to seek and receive approval from SBA of the joint venture agreement for competitive 8(a) contracts, but the approval requirement would remain for 8(a) sole source contracts, because size protests from other 8(a) participants are not permissible with respect to 8(a) sole source procurements. We support the proposed elimination of SBA approval of a joint venture agreement prior to the award of a competitive 8(a) contract. In addition to the drafting of a joint venture agreement, 8(a) participants can incur significant expenses during the SBA approval process. In our experience, the submission and approval process varies from district office to district office and many offices have varying requirements, particularly in terms of the content of the agreements themselves. So, what may be approved by SBA in one district office is not necessarily approved in another. This adds to the confusion, time, and cost. Eliminating the approval process for competitive 8(a) contracts will assist with reducing the time and expense not only for participants but also for SBA, as this back and forth will be eliminated. While there may be an uptick in size protests for competitive 8(a) procurements, this proposed change will likely encourage participants to ensure that their agreements are consistent with SBA's regulations from the outset.

- **Dollar Limits on 8(a) Contracts**

There are certain limits on the ability of a participant to obtain additional sole source 8(a) contracts once it has received a specific dollar level of overall 8(a) contracts. SBA is proposing to simplify this rule, to provide that a participant may not receive sole source 8(a) contracts where it has received a combined total of 8(a) competitive and sole source contracts in excess of $100 million during its participation in the program. Additionally, the rule would further clarify that in determining whether a participant has reached the limit, SBA will look at 8(a) revenues that the participant actually received, not projected revenues. While we do not believe that there should be any limit to the dollar level of overall 8(a) contracts that a participant may receive during its time in the program, to the extent SBA continues to believe that there should be a limit, we agree with the clarifying change to $100 million, regardless of NAICS code. Additionally, we support SBA's clarifying point that it will look only at revenues received, not projected. Participants often may be awarded indefinite-delivery/indefinite-quantity contracts with a high maximum or potential value, but the value of work ordered by the agency and actually performed by the participant is significantly less. A participant should not be punished for revenue that it did not actually receive.

Mentor-Protégé Program

- **SBA Review of Mentor Qualifications Should Not Delay Processing of Applications**

SBA has proposed reorganizing its mentor-protégé regulations to clarify that it uses a three-pronged analysis for mentor qualification: (1) whether the mentor is capable of carrying out responsibilities to its protégé under the mentor-protégé agreement; (2) whether the mentor is not debarred or suspended; and (3) whether the mentor can give value to its protégé. While we support SBA's commitment to ensuring that mentors are qualified and are capable of providing support to their protégés, we do not believe it will serve the purposes of the ASMPP for SBA to perform an in-depth analysis of these three factors, as this may delay the processing of mentor-protégé applications. Since SBA began accepting applications under the ASMPP in October 2016, the processing time for applications has slowly increased from a matter of weeks to several months. Additional analysis performed by SBA regarding the financial capabilities of a mentor, for example, or reviewing the mentor's systems in connection with the assistance it has proposed to provide to its protégé, would only serve to increase the application processing time. SBA reviewers should be aware that these criteria are being codified for clarification but should not trigger an independent in-depth analysis.

- **Mentor Character Determinations**

We support SBA's clarification that it will decline a mentor's application to the program if SBA determines that the mentor does not have good character. It is important that mentor-protégé relationships are established only with mentors that have good character and will honor the commitments made in their mentor-protégé agreements. We suggest that SBA provide some guidance regarding how it will measure the character of a mentor.

- **Competing Mentor-Protégé Joint Ventures**

We support SBA's clarification that two small business joint ventures involving the same mentor may not submit competing proposals for the same opportunity. SBA's rules clearly establish that the assistance a mentor provides to one protégé should not conflict with the assistance it provides to another. The submission of competing proposals for the same opportunity would clearly violate this policy.

- **SBA Should Not Count Inadequate Mentor-Protégé Relationships Toward a Protégé's Lifetime Limit**

We agree with SBA that mentor-protégé relationships which do not provide substantial business development or contracting opportunities to protégés run counter to the goal of the Mentor-Protégé program, and as such should not be counted toward the protégé's lifetime mentor-protégé relationship limit. However, while we understand the allure of the easily-applied, mechanical proposed rule, we are concerned that it could lend itself to abuse. Specifically, if termination of the mentor-protégé relationship within 18 months of SBA approval of the mentor-protégé agreement is the only requirement to "prove" the insufficiency of a particular relationship, then there is no regulatory mechanism to keep unscrupulous businesses from running through an endless chain of relatively short-lived mentor-protégé relationships. These businesses would gain the benefit of multiple mentor-protégé relationships, while other businesses would be confined to the two-relationship limit. Rather than analyze the substance of a mentor-protégé relationship, this proposed rule looks solely to the timing of the relationship, thereby incentivizing gamesmanship by firms shopping for mentors and joint venture relationships.

To forestall such a problem, SBA should require evidence of an ineffective relationship beyond simply early termination of the agreement. Early termination is not the only objective evidence of an ineffective relationship; objective evidence could also include failure to submit any proposals during the 18-month period, or the mentor's failure to offer any subcontracting opportunities to the protégé. Either of these options would be both substantive and objective. They require a simple, quantitative analysis that is easy to apply, but still encompasses the substance of individual mentor-protégé relationships. Further, SBA already requires annual review of mentor-protégé relationships. The data gathered during those reviews could also be used to prove the effectiveness or ineffectiveness of the relationship. Indeed, SBA also proposes to use a protégé's failure to respond to those reviews as grounds to terminate the relationship, and we agree with this proposed rule. Using the information gathered during that review to help determine whether a mentor-protégé relationship should "count" follows logically for both these proposed changes to 13 C.F.R. § 125.9.

The issue of meaningful mentor-protégé relationships is also affected by SBA's lifetime cap on the number of mentors a protégé may have. As the regulations currently stand, a mentor-protégé relationship may only last for a maximum of six years, and a protégé may only have two total mentors in its lifetime. While explicitly allowing ineffective relationships to be terminated without punishing the protégé is a step in the right direction, it is not far enough. Raising the lifetime cap on the number of mentors a small business may have from two mentors to four mentors would further help alleviate the problem of ineffective mentorship. However, the requirement to only have two mentors <u>concurrently</u> would remain helpful, as it ensures that the protégé's attention is not unnecessarily divided, and that the protégé can still perform its contracts satisfactorily.

- **SBA Should Not Require Size Recertification of Mentor-Protégé Joint Venture Upon Premature Termination of Mentor-Protégé Agreement**

We understand that SBA wants to ensure that large businesses do not enter a mentor-protégé relationship solely for the purposes of creating a small business joint venture that is eligible for set asides. However, requiring size recertification of the joint venture upon SBA's early termination of the mentor-protégé agreement is not the best way to solve that problem, because that recertification will have a much more serious impact on the protégé than on the mentor; in short, it will have the unintended effect of punishing a protégé for its mentor's failure to perform.

The better option here is the existing regulation, which substitutes the former protégé for the joint venture under any contracts the joint venture is currently performing, if the former protégé is capable of performing those contracts on its own. That way, the requiring agency still receives small business credit for the contract, and the former protégé still has a chance to acquire experience. Recertification of the joint venture would be unnecessary in that event, as the joint venture would no longer be performing any contracts. Even if the former protégé is <u>not</u> capable of performing on its own, however, the joint venture should still not be required to recertify its size. Instead, it should be permitted to finish performing contracts awarded to the joint venture, and the agency should still be able to receive small business credit for the work of the joint venture. This will give the former protégé an opportunity to gain experience from its performance on the joint venture contracts, and will not strip the protégé of opportunities due to its mentor's irresponsibility.

- **SBA Should Not Limit Mentors to Firms with Less Than $100 Million in Average Annual Revenues**

We submit that the proposed restriction is entirely unnecessary and is, at best, a solution in search of a problem. The purported rationale for the restriction cited in the Proposed Rule was that mid-sized firms would benefit from the $100 million limitation, and allow them to more effectively compete with very large firms. However, the goal of the mentor-protégé program is to further the development of small businesses and not the development of mid-size firms as opposed to larger firms. This goal is echoed in the Proposed Rule itself, as SBA noted that "SBA's focus in the mentor-protégé program is the protégé firm, [and] what business development assistance a proposed mentor can provide to a protégé to enable that firm to more effectively compete on its own in the future." See 84 Fed. Reg. 60846, 60859, supra. It is also reflected in the ASMPP regulations. 13 C.F.R. § 125.9(a) ("The small business mentor-protégé program is designed to enhance the capabilities of protégé firms by requiring approved mentors to provide business development assistance to protégé firms and to improve the protégé firms' ability to successfully compete for federal contracts."). As the ability of a mentor to provide business assistance to a protégé is SBA's paramount concern, the size of a mentor is not a matter that should be relevant to the SBA. All that should matter is that, as stated in the ASMPP regulations, the proposed mentor "demonstrate[] a commitment and the ability to assist small business concerns." 13 C.F.R. § 125.9(b).

Furthermore, it is inherently the case in a mentor-protégé program that mentors, whether very large or mid-size or small, benefit from joint venturing with small businesses. There is nothing wrong with very large mentors receiving benefits from the mentor-protégé program in return for the valuable services they provide to protégés. And, under a properly constituted and SBA-monitored mentor-protégé arrangement, there is little or no risk that large businesses, including very large businesses, will benefit from joint venturing at the expense of small businesses, as the small business joint venture partner is required to perform 40% of the work performed by the joint venture, and the joint venture must meet the applicable performance of work requirements.

Most importantly, there is no question that such a restriction would harm small businesses, as it would restrict the universe of potential mentors which could provide valuable business assistance to them. Indeed, there are circumstances in which large mentors can provide business assistance over and beyond that of mid-sized firms. For example, in the construction sector, small firms are often not capable of obtaining bonding on their own, and thus require bonding support from a potential mentor. Moreover, in addition to joint venturing and bonding support, very large mentors are an important source of other forms of support to protégés by providing them with significant subcontracting assistance, management and technical assistance, including training, and other forms of general and administrative support (such as accounting, human resources, recruiting, and so forth). Stated simply, a very large business typically has much greater capacity to provide these kinds of robust services than mid-size firms. And, with respect to subcontracting assistance, very large businesses are in a position to benefit the Government by allowing federal agencies to meet their small businesses goals.

We also believe that SBA should revise its policy regarding how it counts protégés of very large mentors with multiple subsidiaries and affiliates. Currently, SBA allows a mentor to have up to three protégés at any one time, inclusive of protégé relationships established by the mentor's subsidiaries or affiliates. It does not make sense to limit the number of protégé relationships established by very large companies with access to substantial resources. For example, some of the larger government contracting companies have subsidiaries specializing in work in a variety of industries. These subsidiaries should be able to establish protégé relationships independent of their parent and sister companies, as the assistance provided by one subsidiary would be very different from the assistance another is able to provide. By issuing such a clarification, SBA would allow small business protégés greater access to more qualified mentoring opportunities.

Moreover, SBA should be willing to relax the three protégé restriction for very large, established mentors that are otherwise capable of providing assistance to additional protégés. So long as the mentor is able to demonstrate to SBA that the assistance it will provide to an additional protégé will not conflict with the assistance it provides to its established protégés, and the mentor has the resources to provide the protégé with this assistance, there is no logical reason for SBA to cap the number of protégés that the mentor is able to assist concurrently at three. If SBA is concerned that a mentor may take ownership interest in more than three protégés, SBA could permit a mentor to have more than three protégés, but limit it to taking ownership interest in no more than three protégés at any one time.

Simply stated, the proposed restriction does not redress any real or potential abuse within the mentor-protégé program. While the proposed exclusion of very large firms from serving as a mentor may benefit mid-sized firms to some extent, any such benefit would be at the expense of the small businesses for which the mentor-protégé program was designed to serve. We respectfully request that the SBA not implement the proposed restriction.

- **There Should Generally Be Fewer Limitations on the Number of Protégés a Mentor May Have at Once**

SBA has proposed to amend 13 C.F.R. § 125.9(b)(3)(ii) by providing that a mentor cannot "generally" have more than three protégés at one time, but that "the first two mentor-protégé relationships approved by SBA between a specific mentor and a small business that has its principal office in Puerto Rico do not count against the limit of three protégés that a mentor can have at one time." While we agree that this amendment is required pursuant to section 861 of the John S. McCain National Defense Authorization Act of FY 2019 ("2019 NDAA") and applaud the change, we respectfully submit that nothing in the Small Business Act restricts a mentor from having three protégés at once except for the above-referenced circumstance. Instead, the Small Business Act requires SBA to issue regulations which address eligibility criteria for participants in the SBA mentor-protégé programs "including any restrictions on the number of mentor-protégé relationships permitted for each participant" without providing a specific number. 15 U.S.C. § 657(b)(3)(A). Similar to our comments above regarding SBA's vetting of prospective mentors, we respectfully submit that SBA allow mentors to have more than three protégés at one time so long as the mentor is capable of and committed to providing agreed-upon assistance to the protégé and that the protégés are not competitors with each other. Indeed, very large firms which operate under multiple NAICS codes have the capability to mentor a correspondingly large number of protégés that are not in competition with each other. Increasing the number of protégés that a mentor may have at once would result in more protégés benefitting from the ASMPP.

- **Mentors Should Receive Positive Consideration for Their Past Performance Evaluation for Subcontracting to Puerto Rican Protégés**

SBA has proposed to amend 13 C.F.R. § 125.9 by adding paragraph (d)(6) which provides that a mentor that provides a subcontract to a protégé with a principal office in Puerto Rico may (a) receive "positive consideration" for the mentor's past performance evaluation and (ii) apply costs incurred for providing training to such protégé towards the subcontracting goals in the mentor's subcontracting plan. We agree that this amendment is required by section 861 of the 2019 NDAA and, therefore, support it.

- **A Protégé Should Be Qualified Under a Secondary NAICS Code If It Is Small Under That Code and Has Some Experience in That Code**

We welcome the proposed clarification that a protégé need not be other than small in its primary NAICS code to qualify as a protégé under the secondary NAICS code. According to the way in which the current 13 C.F.R. § 125.9(c)(1)(ii) is drafted, it appears that in order to qualify as a protégé under a secondary NAICS code, the concern must be other than small in its primary NAICS code. SBA has clarified that this was not its intent when it drafted the regulation. We welcome the clarification eliminating the requirement that in order to qualify as a protégé in a secondary NAICS code for which it is small, all that is required is that the concern show how the mentor-protégé relationship will help it further develop or expand its current capabilities in that secondary NAICS code and that it has some experience in that NAICS code. This proposed amendment gives protégés maximum flexibility in seeking mentors that can provide assistance in their business development for any business line in which the protégé has experience.

In addition to SBA's proposed change, we also believe that it should not be necessary for a protégé to demonstrate experience in its secondary code before applying for the ASMPP under that code. So long as the protégé firm has sufficient capabilities to successfully perform contracts under that code, the protégé and mentor should be able to apply under that code. This would be consistent with the way SBA treats tribally-owned participants, as tribes are able to establish a new 8(a) firm without having to wait for the firm to accrue two years of experience. We believe that if a protégé has included its plans to perform work in a secondary NAICS code in its business plan but has not had luck getting work under that particular code, the ASMPP would be a particularly useful vehicle for helping the protégé achieve that objective.

- **Request for Reconsideration**

Through the proposed rule, SBA proposes to eliminate the reconsideration process for declined mentor-protégé agreements as unnecessary. We strongly oppose this elimination. Similar to our comments above regarding SBA's request for comments on whether the reconsideration process should be eliminated for the 8(a) program, elimination of the reconsideration process for mentor-protégé agreements will cause undue delay and harm to small businesses. Currently, the regulations provide that if a mentor-protégé agreement is denied, the small business protégé may seek reconsideration within 45 days of SBA's decision to decline the relationship. If SBA denies the mentor-protégé relationship again, the small business must wait 60 days before it is able to apply again. SBA believes that the 60-day resubmission period is sufficient.

We respectfully disagree. In our recent experience, SBA is currently taking approximately 90 days to review and issue a decision on a mentor-protégé application. If an application is denied, the protégé does not often wait the full 45 days to seek reconsideration, as the protégé is anxious to begin receiving assistance from its mentor, which it cannot do until the relationship is approved. Then, SBA takes approximately one month to render a decision on the reconsideration request. Notably, many reconsideration requests are submitted to correct a minor error or flaw or provide additional context or clarification to SBA. A small business protégé should not be required to wait 60 days to reapply and then another 90 days for a decision, when it already waited approximately 90 days during the first submission. Even assuming a protégé utilizes the full 45-day reconsideration period, a protégé will likely receive a decision on its mentor-protégé relationship roughly two and a half months after the initial denial, as opposed to at least five months if the reconsideration process is eliminated. Given the desire for the protégé to begin receiving assistance from its mentor, which oftentimes includes forming a joint venture for an imminent opportunity, any additional time that is added to the review and approval process can cause significant hardship to a small business. Accordingly, we do not support elimination of the reconsideration process for mentor-protégé agreements.

Other Changes to SBA Government Contracting Program Requirements

- **Economic Dependence Affiliation**

At the outset, we support SBA's decision to amend the newly organized concern rule contained in 13 C.F.R. § 121.103(g) by clarifying that affiliation may be found where both former and "current" officers, directors, principal stockholders, managing members, or key employees of one concern organize a new concern in the same or related industry or field of operation, and serve as the new concern's officers, directors, principal stockholders, managing members, or key employees. Simply put, the newly organized concern rule should apply where the key individuals are <u>still</u> associated with the first company.

In addition, we believe SBA should consider revising its regulations to eliminate economic dependence from its definition of affiliation found at 13 C.F.R. § 121.103. Other subparts of the affiliation rule, in addition to the False Claims Act and other fraud statutes, already guard against what the rule tries to prevent. As it currently stands, this rule is a "belt and suspenders" approach to prevent small businesses from obtaining all of their work from one large company. We believe that SBA should dispense with the rule altogether, as the concept is covered in other rules. The rule also creates a presumption or hurdle for a small business that is otherwise hard to overcome. What SBA should examine is whether a small business is functioning autonomously and independently; nothing in the Small business Act states that "economic dependence" automatically renders a firm dependent. If SBA's concern is to prevent fraud or "spin-off" small businesses, there already exists a whole regulatory scheme that addresses such issues. Therefore, we believe the interests of small businesses are best served if SBA eliminates the rule altogether from its definition of affiliation.

If SBA chooses not to eliminate the concept of economic dependence from its affiliation regulations, at the very minimum we believe SBA should revise its affiliation regulations to more clearly define the economic dependence rule outlined in 13 C.F.R. § 121.103(f)(2). As it stands, "SBA may presume an identity of interest if the concern in question derived 70% or more of its receipts from another concern over the previous three fiscal years." 13 C.F.R. §121.103(f)(2). This presumption of economic dependence can "be rebutted by a showing that despite the contractual relations with another concern, the concern at issue is not solely dependent on that other concern[.]" <u>Id.</u> As it relates here, the regulations only provide one clear example of how a challenged concern can satisfy the foregoing standard—i.e., by establishing that it "has been in business for a short amount of time and has only been able to secure a limited number of contracts." <u>Id.</u> We understand SBA specifically added this exception to the regulation because OHA case law has long recognized such an exception, and, in adopting the "70%" rule, it was SBA's intent to codify such case law. <u>See</u> 81 Fed. Reg. 34243, 34252 (May 31, 2016). That said, in drafting the current regulation, SBA did not fully explain the scope or applicability of the foregoing exception. We believe the small business community would greatly benefit from SBA doing so now.

In enacting the current version of the economic dependence rule, SBA recognized that a mechanical application of the 70% presumption would unduly penalize a firm that has only recently begun operations either initially or after a period of dormancy, and, as such, has been unable to secure multiple sources of revenue. <u>See</u> 81 Fed. Reg. 34243 at 34252 (citing <u>Size Appeal of Argus and Black, Inc.</u>, SBA No. SIZ-5204 (2011) and <u>Size Appeal of Olgoonik Solutions LLC</u>, SBA No SIZ-5669 (2015)). Consequently, where a concern can establish that the presumption should be rebutted on this basis, the revenues such a concern derives from its alleged-affiliate are effectively not "counted" for purposes of an economic dependence analysis.

We agree that this exception makes sense. However, we believe it needs to be more clearly defined.

Specifically, we believe SBA should add three provisions to the economic dependence rule. First, SBA should provide a specific time period during which a concern will be considered to have recently become "active." We suggest that a concern should qualify as having recently become "active" for a period of two years, measured from the date the concern begins earning revenues, either initially or after a period of dormancy. Second, we believe SBA should define a period of dormancy as any one year or longer period during which a concern does not generate revenues. Lastly, we believe SBA should revise the regulation to provide that the revenues a concern derives from contracts with other companies that were obtained during the concern's recently "active" period will be excluded for purposes of an economic dependence analysis for the life of those subcontracts.

As it is SBA's goal to not penalize a company that derives a large percentage of its revenues from subcontracts with another company, upon becoming active, it would only make sense to extend that rule for the life of the subcontracts. Many government subcontracts include provisions that limit the subcontractor's ability to terminate the agreement and allow the prime contractor to unilaterally exercise option periods. Thus, if a recently active company obtains a large subcontract, it is quite possible the company will be obligated to perform, and therefore derive revenue from, such work for a number of years. This type of long-term revenue stream would normally be viewed as advantageous for a growing small business. However, under the current regime, a recently active concern may be deterred from entering into such a subcontract, given the protracted impact the revenues from such work will have on an affiliation analysis.

For example, if a company is awarded a five-year, $50 million-dollar subcontract in its first year of operation, it is likely that regardless of the efforts the company makes to diversify its revenue sources, the company will derive at least 70% of its revenues from that subcontract for a year or more—unless the company experiences exponential growth. Indeed, for each year that such a subcontract is in place, the company would have to obtain more than $3 million in work from other concerns to rebut the "70%" rule (i.e., to offset the $10 million derived on an annual basis from the subcontract). If the company was unable to do so, it could argue that it only recently became active and should therefore be permitted to rebut the presumption of economic dependence. However, it is unlikely the company would be able to shield itself by claiming recently "active" status for more than a few months, or perhaps a year at most. We do not believe this result comports with the policy underlying the "70%" rule.

In sum, while SBA has indicated that it does not want to punish a concern that derives a large percentage of contract revenues from another concern—merely by virtue of obtaining a large subcontract(s) from another concern upon becoming active—SBA's regulations do not effectively implement that policy. Thus, we believe SBA should strongly consider revising the economic dependence rule, as outlined above, to provide more transparency and predictability to small business concerns that are just starting to generate revenue and pursue business opportunities, either initially or after a period of dormancy.

- **SBA's Associate General Counsel for Procurement Law Should be Authorized to Independently Initiate or File Size Protests**

SBA has proposed to amend 13 C.F.R. § 121.1001 by providing the SBA's Associate General Counsel for Procurement Law with the authority to initiate or file size protests. We strongly support this proposed additional protest authority granted to SBA. In our experience, information indicating that a contractor was likely other than small at the time it made its small business representation often comes to light after it has begun performing a set-aside contract and the deadline has passed for a timely protest by a disappointed bidder. By giving the Associate General Counsel for Procurement Law this authority, SBA will have a potentially powerful tool by which to identify those companies which are other than small and ineligible for set-aside procurements and prevent them from receiving such set-aside contracts or other assistance under the Small Business Act.

- **SBA Should Require Contracting Officers to Consider Past Performance, Capabilities, and Experience for All Contracts Only as Required by Statute**

SBA has, consistent with the statutory mandate of 13 U.S.C. § 644(e)(4)(B)(i) and (q)(1)(B), proposed to amend 13 C.F.R. § 125.2 by adding paragraph (g) which would require agencies to consider the past performance, capabilities, and experience of first–tier subcontractors for small businesses which submit offers in response to bundled/consolidated contracts and for multiple award contracts valued above the "substantial bundling" threshold. However, the proposed regulation allows for the agency to, at its own discretion, consider the past performance, capabilities, and experience of first-tier subcontractors for other procurements. SBA has specifically requested comments on whether, as a policy matter, such consideration should be required for all contracts or only when statutorily required. We submit that there is no overriding policy need for SBA to go beyond the statutorily required circumstances in which such past performance must be considered. Because a small business is unlikely to have past performance, capabilities, or experience within the scope, size, or complexity of a bundled/consolidated requirement or a multiple award contract that is larger than the substantial bundling threshold, it makes sense that an agency be required to consider the past performance, capability, and experience of first- tier subcontractors so that it has a fair opportunity to compete for such procurements. For other procurements, the small business may well have its own past performance, capabilities, and experience of comparable scope, size, and complexity to the requirement. Therefore, evaluation of past performance at the first-tier subcontractor level may not be necessary in many instances. Accordingly, giving agencies discretion to consider such past performance on a case-by-case basis is reasonable.

❖ **ANC-Owned Firms Should Not Be Required to Submit Subcontracting Plans**

SBA has proposed to amend 13 C.F.R. § 125.3 to clarify that ANC-owned businesses which are treated as small businesses for subcontracting-goaling purposes are not required to submit subcontracting plans. We support this proposed amendment because it comports with the general statutory rule that the Government is prohibited from requiring small businesses to submit subcontracting plans. See 15 U.S.C. § 637(d)(8). Logically, there is no reason for an ANC-owned business to submit a subcontracting plan if it is treated as a small business for subcontracting-goaling purposes when generally businesses which independently qualify as small do not submit subcontracting plans. Moreover, forcing ANC-owned entities to submit subcontracting plans would force them to give up work to other businesses when the reason such firms qualify as small businesses for subcontracting purposes is to encourage them to do more work for the benefit of disadvantaged communities. Requiring ANC-owned firms to submit a subcontracting plan would be administratively burdensome, and would be counter to the underlying purpose of Executive Order 13771, "Reducing Regulation and Controlling Regulatory Costs," which, as its name implies, is to reduce unnecessary and burdensome regulations and to control costs associated with regulations.

❖ **Certificate of Competency ("CoC") Procedures Are Not Appropriate for 8(a) Sole Source Contracts**

We agree with the SBA that it is unnecessary and inappropriate for SBA to institute a CoC proceeding in the context of an 8(a) sole source procurement. As SBA has already explained with regard to 8(a) sole source awards in a prior proposed rulemaking, "[i]n most cases, the procuring agency would have selected the Participant for the sole source contract by assessing the firm's capabilities prior to offering the procurement to SBA. It is unlikely that the procuring agency would select a Participant, go through negotiations with the firm, and then find the firm not to be responsible." Small Business Size Regulations; 8(a) Business Development/Small Disadvantaged Business Status Determinations; Rules of Procedure Governing Cases Before the Office of Hearings and Appeals, 62 Fed. Reg. 43584, 43592 (Aug. 14, 1997). Should an agency find a potential 8(a) sole source awardee to be non-responsible, SBA has proposed that it avail itself of the substitution/withdrawal procedures set forth at proposed 13 C.F.R. § 124.503(e). Accordingly, we welcome the express statement in the Proposed Rule at 13 C.F.R. § 125.5(a)(1) that the CoC program is not applicable to 8(a) sole source awards.

❖ **The Threshold for CoC Appeals Should Be the Simplified Acquisition Threshold**

We agree with the SBA's proposed amendment to 13 C.F.R. § 125.5(a)(1) that the threshold for CoC appeals by the contracting agency should be at the Simplified Acquisition Threshold and not $100,000. The Simplified Acquisition Threshold is currently generally

$150,000 rather than $100,000. See, e.g., 48 C.F.R. § 2.101. The current $100,000 threshold is, therefore, out of date.

❖ **NAICS Code Appeal Stays of Proposal Submission Are Welcome Change**

We support SBA's proposal to stay the submission of proposals when a NAICS code appeal has been filed against a solicitation. Under the current rules, the filing of a NAICS code appeal only stays the award of the contract, not the submission of proposals. If an agency does not choose to stay proposal submissions on its own, it is able to award a contract based on the proposals it receives even if OHA decides that the NAICS code assigned to the procurement was not appropriate. At this point, a successful appellant may nevertheless be unable to compete for the opportunity, as the agency would be able to proceed with the award. Such an outcome does not make sense, and discourages the submission of otherwise valid NAICS code appeals. We therefore support SBA's proposal to revise its NAICS code appeal regulations to require a stay of proposal submission when an appeal has been filed.

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We thank SBA for its efforts, and we appreciate the opportunity to submit these comments. Please do not hesitate to contact the undersigned at (202) 857-1000 or pmazza@pilieromazza.com if you have any questions about these comments.

Very truly yours,

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